

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14**

UNITED RENTALS (NORTH AMERICA), INC.

Employer

and

Case 14-RC-267080

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 513**

Petitioner

REVISED DECISION AND DIRECTION OF ELECTION

On October 5, 2020,¹ International Union of Operating Engineers, Local 513 ("Petitioner") filed its original petition in this case with the National Labor Relations Board ("Board"). By this petition, Petitioner seeks to represent all full-time and regular part-time technicians and delivery drivers employed by United Rentals (North America), Inc. ("Employer") at its facility located in Scott City, Missouri (the "Branch").

The only matter at issue is whether the election should be conducted by manual or mail ballot method. Election arrangements, including the voting method, are not litigable matters at a preelection hearing. Sec. 102.66(g)(1) of the Board's Rules and Regulations. See also, Representation-Case Procedures, 84 Fed. Reg. 69524, 69544 fn. 82 (Dec. 18, 2019) (citing *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366, 1367 (1954)). On October 27, the parties entered into a stipulated record² and shortly after, pursuant to that stipulation, they submitted their positions to me on the voting method and details of election.

Based on the stipulated record, having reviewed the parties' positions, and having considered the factors discussed below, I have determined that because of the extraordinary circumstances presented by the ongoing COVID-19 pandemic, the Board will conduct this election by mail ballot.

POSITIONS OF THE PARTIES

Although the Petitioner sought a manual election on the face of the petition, its subsequent position simply seeks to have the election as soon as practicable whether that be by mail or manual balloting.

The Employer does not contend that COVID-19 is no longer an issue in the community but highlights the Board's general preference is for manual elections. The

¹ All dates are in 2020 unless otherwise noted.

² There are approximately eight employees in the stipulated unit.

Employer notes it is considered an essential business, remaining open throughout the COVID-19 pandemic, and Missouri has been fully reopened since June 16. While it acknowledges that four employees at the Branch tested positive for COVID-19 in October, it asserts a manual election can safely be held there. The Employer notes “access to the Branch was restricted to personnel who were assigned to work at the Branch” from October 6 to October 20, a period during which “all CDC protocols were in place, including temperature checking, sanitation throughout the day, symptom-free confirmation from each employee, social distancing, and mask wearing.” From October 21 to 25, two drivers were “out ill with COVID,” and the Employer “began operating normally with all personnel back at work” on October 26.

The Employer will abide by the procedures set forth in General Counsel Memorandum 20-10, “Suggested Manual Election Protocols” (GC 20-10). Among other things, it will:

- Implement procedures sufficient for releasing voters to accommodate social distancing and cleaning requirements, without endangering participants by unnecessarily elongating exposure among Board Agents and observers;
- Clean the entire Shop with an electrostatic fogger and disinfect door handles and surfaces in the polling area the night before the election;
- Require social distancing, mask wearing when social distancing is not possible, and frequent cleaning of surfaces for the period from the Notice of Election up to and including the date of election;
- Perform temperature checking and require daily symptom-free confirmation from each employee for the period from the Notice of Election up to and including the date of election and certify in writing that no one has reported to work with a temperature and that everyone has self-certified to be symptom-free;³
- Direct individuals who are not a party, party representative, or an observer to stay at least 15 feet away from the Board Agent at the pre-election conference and the ballot count
- Provide separate tables spaced ten feet apart so the Board Agent, observers, the voting booth, and the ballot box are at least ten feet apart. The tables and chairs will be wiped down with disinfectant wipes and then disinfected again with an electrostatic fogger;
- Provide sufficient disposable pencils without erasers for each voter to mark their ballot; glue sticks or tape to seal challenge ballot envelopes; a three-sided plexiglass barrier around the Board agent’s table to further protect the Board Agent from voters, the observers, pre-election conference attendees, and ballot count attendees;

³ The Employer did not explain what would happen if someone, particularly an eligible voter, reported to work with a temperature or failed to confirm they were symptom free.

- Allow an inspection of the polling area by videoconference at least 24 hours prior to the election so that the Board agent and parties can view the polling area;
- Require all voters, observers, party representatives, and other participants to wear CDC-conforming masks in all phases of the election, including the pre-election conference, in the polling area, or while observing the ballot count in accordance with CDC guidance. Signs will be posted in or immediately adjacent to the Notice of Election to notify voters, observers, party representatives, and other participants of this requirement.

In addition, the Employer offered to provide KN-95 masks, hand sanitizer, gloves, and wipes for observers, the Board Agent, and voters.

The Employer proposes holding a manual election in its “Shop,” which measures approximately 90 feet by 70 feet by over 20 feet tall. The Shop has three doors approximately 60 feet from each other, and it will designate one door for the Board agent conducting the election, another door for employees to enter the polling place, and the third door for employees to exit the voting area. The Employer did not propose specific times or polling periods beyond the sufficiency for social distancing and cleaning requirements.

It also argues the Board’s mail ballot procedures have “inherent weaknesses, persistent criticism, and claims of fraud and dishonesty,” but cited no cases or other sources for these claims.⁴

THE BOARD’S STANDARD

Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to ensure the fair and free choice of bargaining representatives and the Board, in turn, has delegated the discretion to determine the arrangements for an election to Regional Directors. *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998) (citing *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946); *Halliburton Services*, 265 NLRB 1154, 1154; *National Van Lines*, 120 NLRB 1343, 1346 (1958)). “It is well established that a Regional Director has broad discretion in determining the method by which an election is held, and whatever determination a Regional Director makes should not be overturned unless a clear abuse of discretion is shown.” *Nouveau Elevator Industries, Inc.*, 326 NLRB 470, 471 (1998) (citing *San Diego Gas* at 1144 fn. 1; *National Van Lines* at 1346). This discretion includes the ability to direct a mail ballot election where appropriate. *San Diego Gas* at 1144-1145.

⁴ While it is regrettably true that laboratory conditions are occasionally destroyed during mail ballot elections, they are also occasionally destroyed during manual elections, resulting in objections and rerun elections. Any party is, of course, free to present evidence of any actual disenfranchisement of voters in postelection objections. See, e.g., *Daylight Transport*, 31-RC-262633 (unpublished August 19, 2020).

The Board's longstanding policy is that elections should, as a general rule, be conducted manually. NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11301.2.⁵ However, a Regional Director may reasonably conclude, based on circumstances tending to make voting in a manual election difficult, to conduct an election by mail ballot. *Ibid.* This includes a few specific situations addressed by the Board, including where voters are "scattered" over a wide geographic area, "scattered" in time due to employee schedules, in strike situations, or other "extraordinary circumstances." *San Diego Gas*, above at 1145.

The Board recognized the ongoing COVID-19 pandemic to constitute "extraordinary circumstances" and reaffirmed Regional Directors' discretion regarding election mechanics in its April 17 "COVID-19 Operational Status Update."⁶ In pertinent part:

Representation petitions and elections are being processed and conducted by the regional offices. Consistent with their traditional authority, Regional Directors have discretion as to when, where, and if an election can be conducted, in accordance with existing NLRB precedent. In doing so, Regional Directors will consider the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state and local laws and guidance.

The Board has continued to affirm the ongoing COVID-19 pandemic to be extraordinary circumstances as contemplated by *San Diego Gas*, above, and its recent Orders⁷ explain:

The Board will continue considering whether manual elections should be directed based on the circumstances then prevailing in the Region charged with

⁵ I note the provisions of the Casehandling Manual are not Board directives or procedural rules. The Casehandling Manual is issued by the General Counsel—not the Board—and is intended to provide guidance to regional personnel in the handling of representation cases. See Representation-Case Procedures, 84 Fed. Reg. 39930, 39937 fn. 43 (2019) ("the General Counsel's nonbinding Casehandling Manual"); *Patient Care*, 360 NLRB 637, 638 (2014) (citing *Solvent Services*, 313 NLRB 645, 646 (1994); *Superior Industries*, 289 NLRB 834, 837 fn. 13 (1988)); *Aaron Medical Transportation, Inc.*, 22-RC-070888 (unpublished 2013) (citing *Hempstead Lincoln Mercury Motors Corp.*, 349 NLRB 552, 552 fn.4 (2007); *Queen Kapiolani Hotel*, 316 NLRB 655, 655 fn.5 (1995)). See also *Sunnyvale Medical Clinic*, 241 NLRB 1156, 1157 fn. 5 (1979).

⁶ <https://www.nlr.gov/news-outreach/news-story/covid-19-operational-status-update>.

⁷ See *Savage Services Corp.*, 21-RD-264617 (unpublished October 1, 2020) (denying review of Regional Director's decision to order a mail ballot election); *Jersey Shore University Medical Center*, 22-RC-263932 (unpublished October 1, 2020) (same); *Sea World of Florida, LLC*, 12-RC-257917 (unpublished September 22, 2020) (same); *Rising Ground*, 02-RC-264192 (unpublished September 8, 2020) (same); *TredRoc Tire Services*, 13-RC-263043 (unpublished August 19, 2020) (same); *Daylight Transport, LLC*, 31-RC-262633 (unpublished August 19, 2020) (same); *PACE Southeast Michigan*, 07-RC-257047 and 07-RC-257046 (unpublished August 7, 2020) (same); *Sunsteel, LLC*, 19-RC-261739 (unpublished August 4, 2020) (same); *Brink's Global Services USA, Inc.*, 29-RC-260969 (unpublished July 14, 2020) (same).

conducting the election, including the applicability to such a determination of the suggested protocols set forth in GC Memorandum 20-10.⁸

As the Board's Orders instruct, I analyze the instant petition using the prevailing circumstances in the Region.⁹

Prevailing COVID-19 Circumstances

COVID-19 has created a public health crisis responsible for over 230,000 deaths in this country and infecting more than 9.25 million U.S. residents, as of November 3.¹⁰ The virus is surging throughout the country with CBS News reporting COVID-19 cases rising in 47 states, including Missouri.¹¹ Much remains unknown about this deadly and debilitating virus, as the U.S. Centers for Disease Control and Prevention (CDC) continues to recognize: "We are still learning about how the virus spreads and the severity of illness it causes."¹² This can be seen in the CDC's acknowledgement earlier this month that COVID-19 spreads not just through respiratory droplets and "close contact"¹³ but also via smaller airborne "particles that can remain suspended in the air over long distances (usually greater than 6 feet) and time (typically hours)."¹⁴ Some

⁸ On July 6, General Counsel Peter Robb issued GC 20-10 setting forth suggested election protocols while specifically noting that it is not binding on Regional Directors because the Board not the General Counsel has authority over matters of representation. Among other things, the General Counsel proposes self-certification that individuals in proximity to the polling place, including observers and party representatives, have not tested positive for COVID-19, or come into contact with someone who tested positive within the preceding 14 days, and are not awaiting test results, along with identifying the number of individuals exhibiting COVID-19 symptoms.

⁹ While the Board has stayed several directed mail ballot elections since late August, stating the requests for review "raised substantial issues warranting review," it has not specified the issues that caused it to grant review, delineated factors outside of *San Diego Gas* to be considered during the COVID-19 pandemic, established a different standard for determining the method of election, or issued any other ruling that impacts my conclusions and findings herein.

¹⁰ "CDC COVID Data Tracker." U.S. Centers for Disease Control and Prevention (CDC). <https://www.cdc.gov/covid-data-tracker/#cases> (accessed November 4).

¹¹ "Infections are rising nationwide" (October 31). CBS News. <https://www.cbsnews.com/live-updates/covid-19-latest-news-2020-10-31/> (accessed November 4).

¹² "How COVID-19 Spreads" (updated October 28). CDC. <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (accessed November 4).

¹³ On October 21, the CDC expanded its definition of "close contact" from being within 6 feet of an infected person for at least 15 minutes to being within 6 feet of an infected person for at least 15 minutes over a 24-hour period, clarifying that multiple separate encounters that total more than 15 minutes carries a higher risk of transmission. "Appendices" (updated October 21). CDC. <https://www.cdc.gov/coronavirus/2019-ncov/php/contact-tracing/contact-tracing-plan/appendix.html> (accessed November 4).

¹⁴ "Scientific Brief: SARS-CoV-2 and Potential Airborne Transmission" (updated October 5). CDC. <https://www.cdc.gov/coronavirus/2019-ncov/more/scientific-brief-sars-cov-2.html> (accessed November 4). See also "How COVID-19 Spreads," above.

studies place transmission distances over 25 feet.¹⁵ Around the same time, the CDC also expanded the underlying medical conditions that place people at a higher risk of severe illness from COVID-19 to include adults with obesity, or who are overweight, or who smoke or have a history of smoking.¹⁶ On October 28, the CDC further reported the existence of COVID-19 reinfections.¹⁷

In assessing the local conditions, I must consider the state of the pandemic in Missouri and Greater St. Louis, where the Board agent conducting the election is located and will be traveling, along with Cape Girardeau and Scott Counties, where Scott City is located and where a manual election would be held. As of November 3, Missouri reported 190,424 COVID-19 cases, with 3,064 fatalities.¹⁸ The rolling seven-day average has remained above 2,000 new cases per day since surpassing that mark on October 26, and Missouri reported a positivity rate of 28.5%.¹⁹ Among the 50 states over the past seven days, Missouri ranks 9th in new COVID-19 cases, 15th in new cases per 100,000 people, 6th in new COVID-19 deaths overall and per 100,000 people.²⁰ The City of St. Louis has a total of 8,847 confirmed cases and 216 confirmed deaths.²¹ When counting the surrounding counties of St. Louis, St. Charles, and Jefferson in Missouri,²² and Madison and St. Clair, Illinois,²³ the total increases to nearly 74,000 confirmed cases and over 1,700 deaths.

Among the 117 counties in Missouri over the past seven days, Scott County ranks 28th and Cape Girardeau County ranks 49th in new COVID-19 cases per 100,000

¹⁵ “What is the evidence to support the 2-metre social distancing rule to reduce COVID-19 transmission?” (June 22). Centre for Evidence-Based Medicine, University of Oxford. <https://www.cebm.net/covid-19/what-is-the-evidence-to-support-the-2-metre-social-distancing-rule-to-reduce-covid-19-transmission/> (“Smaller airborne droplets laden with SARS-CoV-2 may spread up to 8 metres [26 feet] concentrated in exhaled air from infected individuals Whilst there is limited direct evidence that live SARS-CoV-2 is significantly spread via this route, there is no direct evidence that it is *not* spread this way”) (emphasis in original) (accessed November 4).

¹⁶ “People with Certain Medical Conditions” (updated November 2). CDC. <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (accessed November 4).

¹⁷ “How COVID-19 Spreads.” CDC, above.

¹⁸ “Statewide Public Health, COVID-19 in Missouri.” State of Missouri. <https://showmestrong.mo.gov/data/statewide-public-health/> (accessed November 4).

¹⁹ Ibid. (7-day positivity rate of 14.2% using the CDC method).

²⁰ Ibid.

²¹ “COVID-19 Data.” (updated November 3). City of St. Louis. <https://www.stlouis-mo.gov/covid-19/data/> (accessed November 4).

²² St. Louis County (30,351 cases, 883 deaths), St. Charles County (11,998 cases, 157 deaths), Jefferson County (6,239 cases, 90 deaths). “Statewide Public Health, COVID-19 in Missouri,” above.

²³ Madison County (7,980 cases, 163 deaths), St. Clair County (8,552 cases, 228 deaths). “COVID-19 Statistics.” Illinois Department of Public Health. <https://www.dph.illinois.gov/covid19/covid19-statistics> (accessed November 4).

people and 19th and 27th, respectively, in COVID-19 deaths. In total cases per 100,000 people, Scott ranks 19th and Cape Girardeau ranks 26th while total COVID-19 deaths puts them at 14th and 15th, respectively, of the 117 counties in Missouri.²⁴

The Employer acknowledges four employees in the Branch tested positive for COVID-19 last month; however, the number of probable or suspected cases of COVID-19 among the petitioned-for employees, other employees, or visitors at the Branch is unknown, or if any employees have quarantined or isolated due to exhibiting symptoms of COVID-19 or having contact with someone who had COVID-19 or exhibited its symptoms.

Current Federal, State, and Local Guidance and Directives

The United States and the State of Missouri are currently in a declared state of emergency due to COVID-19.²⁵

The CDC explains that “COVID-19 is thought to spread mainly through close contact from person to person, including between people who are physically near each other (within about 6 feet). People who are infected but do not show symptoms can also spread the virus to others.”²⁶ The CDC and South Dakota Department of Health (SD-DOH) highlight: **“The best way to prevent illness is to avoid being exposed to this virus”** (emphasis in originals).²⁷ “It spreads through respiratory **droplets or small particles, such as those in aerosols, produced when an infected person coughs, sneezes, sings, talks, or breathes**” (emphasis in original).²⁸ The CDC also warns: **“It is important to realize that you can be infected and spread the virus but feel totally well and have no symptoms”** (emphasis in original).²⁹

²⁴ “Statewide Public Health, COVID-19 in Missouri.” (accessed November 4)

²⁵ “Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak” (March 13). The White House. <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (accessed November 4); “Executive Order 20-16” (September 15). Missouri Secretary of State. <https://www.sos.mo.gov/library/reference/orders/2020/eo16> (extending state of emergency until December 30) (accessed November 4).

²⁶ “How COVID-19 Spreads, above. The South Dakota Department of Health (SD-DOH) also recognizes these COVID-19 facts. See “Precautions to Avoid Illness.” SD-DOH. <https://doh.sd.gov/news/Coronavirus.aspx#Avoid> (accessed October 29).

²⁷ “How to Protect Yourself & Others” (updated October 28). CDC. <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (accessed October 29); “Precautions to Avoid Illness.” SD-DOH, above.

²⁸ “Frequently Asked Questions, Spread” (updated October 29). CDC. <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Spread> (accessed November 4).

²⁹ “Overview of Testing for SARS-CoV-2 (COVID-19)” (updated October 21). CDC. <https://www.cdc.gov/coronavirus/2019-ncov/hcp/testing-overview.html> (accessed November 4).

The CDC's recommendations for dealing with this public health threat include, among others, the avoidance of large gatherings, the use of facial coverings, good personal hygiene, and social distancing of at least six feet. Guidance issued by the CDC recommends limiting in-person visits to stores as well as in-person contact for deliveries, whenever possible, and notes contracting COVID-19 through the mail is an "unlikely possibility." In order to further mitigate the minimal risk associated with domestic mail, the CDC simply advises: "After collecting mail from a post office or home mailbox, wash your hands with soap and water for at least 20 seconds or use a hand sanitizer with at least 60% alcohol."³⁰

Updated guidance from the CDC continues to highlight: "Travel increases your chance of getting and spreading COVID-19. **Staying home is the best way to protect yourself and others from COVID-19**" (emphasis in original).³¹ Missouri Department of Health & Senior Services (MDHSS) cites to this updated CDC guidance.³²

At the outset of the pandemic, Missouri was under stay-at-home orders from April 6 through May 3. By June 16, statewide restrictions had been lifted, in favor of local officials "put[ting] further rules, regulations, or ordinances in place."³³

Election Guidance

While the CDC has not specifically addressed Board elections; it has issued recommendations based on the following guiding principles:

The more an individual interacts with others, and the longer that interaction, the higher the risk of COVID-19 spread. Elections with only in-person voting on a single day are higher risk for COVID-19 spread because there will be larger crowds and longer wait times.

Specifically, the CDC instructs officials to "[c]onsider offering alternatives to in-person voting if allowed" and recommends voters "**[c]onsider voting alternatives available in your jurisdiction that minimize contact**. Voting alternatives that limit the number of people you come in contact with or the amount of time you are in contact with

³⁰ "Running Essential Errands" (updated September 11). CDC <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html> (accessed November 4).

³¹ "Travel during the COVID-19 Pandemic" (updated October 21). CDC. <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-in-the-us.html> (accessed November 4).

³² "Travelers." MDHSS. <https://health.mo.gov/living/healthcondiseases/communicable/novel-coronavirus/travelers.php> (accessed November 4).

³³ "Governor Parson Announces Missouri Will Fully Reopen, Enter Phase 2 of Recovery Plan on June 16" (June 11). Missouri Governor Michael L. Parson. <https://governor.mo.gov/press-releases/archive/governor-parson-announces-missouri-will-fully-reopen-enter-phase-2-recovery> (accessed November 4).

others can help reduce the spread of COVID-19” (emphasis in original).³⁴ The Board has a longstanding and well-established alternative to in-person voting, a mail ballot election. Following the CDC’s guidance, on June 4, Missouri passed a law allowing absentee voting without notarization for those who have contracted, or are simply in an at-risk category for contracting, COVID-19.³⁵

On July 6, General Counsel Peter Robb issued GC 20-10, a memorandum setting forth suggested manual election protocols, while specifically noting that it is not binding on Regional Directors because the Board—not the General Counsel—has authority over matters of representation. It provides, in relevant part:

They [Regional Directors] have made, and will continue to make, these decisions on a case-by-case basis, considering numerous variables, including, but not limited to, the safety of Board agents and participants when conducting the election, the size of the proposed bargaining unit, the location of the election, the staff required to operate the election, and the status of pandemic outbreak in the election locally.

In other words, GC 20-10 offers advice on how to conduct a manual election when and if a Regional Director determines a manual election is appropriate. It is not a checklist whereby a manual election is mandated if the protocols are met.

The suggested protocols include: polling times sufficient to accommodate social distancing without unnecessarily elongating exposure among Board Agents and observers; the employer’s certification in writing that the polling area is consistently cleaned in conformity with CDC standards; a spacious polling area, sufficient to accommodate six-foot distancing; separate entrances and exits for voters; separate tables spaced six feet apart; sufficient disposable pencils without erasers for each voter to mark their ballot; glue sticks or tape to seal challenge ballot envelopes; plexiglass barriers of sufficient size to protect the observers and Board Agents; and provision of masks, hand sanitizers, gloves, and disinfecting wipes.

The General Counsel’s suggestions also include the Employer’s self-certification 24 to 48 hours before a manual election for how many individuals have been present in the facility within the preceding 14 days who have tested positive for COVID-19; who have been directed by a medical professional to proceed as if they have tested positive for COVID-19; who are awaiting results of a COVID-19 test; who are exhibiting symptoms of COVID-19; or who have had direct contact with anyone in the previous 14

³⁴ “Considerations for Election Polling Locations and Voters.” U.S. Centers for Disease Control and Prevention. <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (accessed November 4).

³⁵ “Governor Parson Takes Security Measures To Safeguard Election Process, Protect Missouri Voters During Covid-19” (June 4). Missouri Governor Michael L. Parson. <https://governor.mo.gov/press-releases/archive/governor-parson-takes-security-measures-safeguard-election-process-protect> (accessed November 4).

days who has tested positive for COVID-19. The certifications in GC 20-10 state “symptoms of COVID-19, including a fever of 100.4°F or higher, cough, or shortness of breath.” However, the CDC’s “Symptoms of Coronavirus” and Missouri’s “Prevention, Symptoms, Treatment, and Transmission” include additional symptoms:

- Fever or chills
- Cough
- Shortness of breath or difficulty breathing
- Fatigue
- Muscle or body aches
- Headache
- New loss of taste or smell
- Sore throat
- Congestion or runny nose
- Nausea or vomiting
- Diarrhea

The CDC and Missouri also note: “This list does not include all possible symptoms.”³⁶

Following issuance of GC 20-10, the CDC updated its COVID-19 pandemic planning scenarios and clarified the definition for the percent of transmission occurring prior to symptom onset (pre-symptomatic transmission). The CDC’s “current best estimate” is that 50% of COVID-19 transmission occurs while people are pre-symptomatic and 40% of people with COVID-19 are asymptomatic³⁷ and would neither be identified nor have sought testing. Similarly, the CDC’s October 21 update for “Travel during the COVID-19 Pandemic,” cited by Missouri Department of Health & Senior Services, continues to warn travelers: “You may feel well and not have any symptoms, but you can still spread COVID-19 to others.”³⁸ Additionally, there is no enforcement mechanism for the protocols suggested in GC 20-10 other than canceling the manual election, which would delay resolution of the question concerning representation. A mail ballot election avoids these concerns.

³⁶ “Symptoms of Coronavirus.” CDC. <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (accessed November 4); “Prevention, Symptoms, Treatment, and Transmission.” Missouri Department of Health & Senior Services. <https://health.mo.gov/living/healthcondiseases/communicable/novel-coronavirus/prevention.php> (accessed November 4).

³⁷ “COVID-19 Pandemic Planning Scenarios” (updated September 10). CDC. <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html> (estimating the infectiousness of asymptomatic individuals compared to infectious individuals at 75%) (accessed November 4). See also “Evidence Supporting Transmission of Severe Acute Respiratory Syndrome Coronavirus 2 While Pre-symptomatic or Asymptomatic” (July). *Emerging Infectious Diseases Journal*. https://wwwnc.cdc.gov/eid/article/26/7/20-1595_article (accessed November 4); “The implications of silent transmission for the control of COVID-19 outbreaks” (July 28). *Proceedings of the National Academy of Sciences of the United States of America (PNAS)*. <https://www.pnas.org/content/early/2020/07/02/2008373117> (“silent disease transmission during the presymptomatic and asymptomatic stages are responsible for more than 50% of the overall attack rate in COVID-19 outbreaks”) (accessed November 4).

³⁸ “Travel during the COVID-19 Pandemic.” CDC, above; “Travelers.” MDHHS, above.

A MAIL BALLOT ELECTION IS APPROPRIATE

Whether a mail ballot election is appropriate in this case requires considering both the public health concerns presented by the COVID-19 pandemic and the Board's stated preference for manual elections. The Employer correctly notes manual elections are the preference of the Board, and I recognize the potential problems associated with mail ballot elections referenced by the Employer are some of the reasons the Board has traditionally preferred manual elections.³⁹ I do not discount those concerns.

Although I do not discount the concern regarding potential voter participation issues and acknowledge the potential risks of mail delivery procedures on the outcome of a mail ballot election, there is no indication that the Postal Service in St. Louis, Scott City, or Scott or Cape Girardeau Counties is unable to deliver mail, that the petitioned-for employees would be unable to understand the mail balloting procedure, that the addresses of the eligible employees are not known or up to date, or that there are any impediments to voter participation. Any mail ballot election, held at any time under any circumstances, includes procedures by which an employee who has not received a ballot in a timely manner may receive a duplicate, and the return date for mail ballots can be extended to accommodate voters who may not be regularly residing at their residence or may be quarantining their mail.

Absent the present pandemic, a manual election would almost certainly be held in this case. The employees are neither "scattered," in the sense of worktime or workplace, nor is there a strike, lockout, or picketing. Prior to the current pandemic the Board regularly conducted manual elections under similar circumstances, and the location proposed by the Employer is consistent with a typical polling place in such an election.

However, my decision in this case is ultimately based on the "extraordinary circumstances" presented by this public health emergency. I recognize a degree of reopening has begun, in the United States generally and in Missouri specifically. At the same time, it is not disputed that COVID-19 remains present, and is currently surging in the community, presenting a well-established and significant health risk. There is not an easily identifiable bright line that can designate when "extraordinary circumstances" have passed while the increased risk of transmission in group activities remains. The difficulty in trying to find a metric on which to base such a decision is demonstrated by the opposing evidence of the rising number of cases in Missouri, including St. Louis and Scott and Cape Girardeau Counties, but the lowered governmental restrictions.

Ultimately, as the Board has made clear, this is a question of discretion. While the Employer has offered to abide by the suggested manual election protocols in

³⁹ The Board's general preference for manual elections is not to be interpreted as a suggestion that mail balloting is somehow inferior or a less reliable or effective means of determining employees' representational desires. See, e.g., *London's Farm Dairy, Inc.*, 323 NLRB 1057, 1058 (1997) (showing the Board has conducted mail ballot elections since its earliest days).

GC 20-10, along with screening election participants, I find the circumstances of this case make it appropriate to hold a mail ballot election. I find that the extraordinary circumstances presented by the COVID-19 pandemic remain present here for several reasons. First, my decision is based on the number of COVID-19 cases in Missouri, the undisputed continued presence of the virus in St. Louis, Scott County, and Cape Girardeau County, and the severity of the COVID-19 risk. In relying on these considerations, I note the level of new cases and the recent increase in cases and positivity rates and death rates in the area.⁴⁰ It is not possible for me to know if this represents an increasing number of infections, a reflection of more widespread testing, better reporting, or simply a momentary spike in cases. However, it does raise the possibility that, if I order a manual election, I will be directing voters and others to congregate under circumstances more dire than those faced today. In any manual election voters will still physically come together in a single location, even if dispersed over time and socially distanced. This represents an increased risk of some degree to all those participating. The fact that four of the Employer's employees have tested positive within the last month, including two in the petitioned-for unit who were out ill less than two weeks ago, highlights the fact the risk of exposure to somebody at the Branch with COVID-19 is not just theoretical.

Mail balloting provides no additional risk to Board agents, parties, voters, or the public and is consistent with current guidance of limiting in-person contact and travel. Even in the midst of this pandemic, the Region has already successfully conducted a number of mail ballot elections. Although an in-person count may be infeasible, arrangements can be made for a virtual remote count that provides all the safeguards of a traditional count.

Moreover, if an employee tests positive for COVID-19, suspects they may have COVID-19 due to symptoms,⁴¹ has an elevated temperature, or must be quarantined due to COVID-19 exposure, they will be deprived of their vote in a manual election. A mail ballot election avoids this significant pitfall and ensures all have an opportunity to vote regardless of their exposure to COVID-19 or health status. Furthermore, there is no known date at which the guidance and circumstances I have described above will change. As a result, a mail ballot election in this matter will allow for holding of the election "at the earliest date practicable" consistent with the Section 102.67(b) of the Board's Rules and Regulations.

Again, the Employer's plan to address these risks attempts to place as many barriers as possible between participants. I find, ultimately, a safer manual election still involves physical interactions, congregating, and as such increased risk to Board agents, parties, voters, and residents. Here, the Board has an established process that

⁴⁰ See "Statewide Public Health, COVID-19 in Missouri." State of Missouri, above.

⁴¹ The potential for voter disenfranchisement increases when using all symptoms for COVID-19 established by the CDC and State of Missouri while the chance of exposure to COVID-19 increases when using only the symptoms in GC 20-10.

avoids these risks, its mail ballot procedure. While mail balloting may not be the Board's general preference, it is one of the ways in which the Board conducts an election when circumstances dictate. Under the present circumstances I find it prudent to order a mail ballot election.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.⁴²

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The following employees of the Employer constitute a voting group appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time technicians and delivery drivers employed by the Employer at its facility located at 2520 East Outer Road, Scott City, Missouri, and excludes all field sales employees, counter sales employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act, is appropriate for the purposes of collective bargaining.

DIRECTION OF ELECTION

The Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **International Union of Operating Engineers, Local 513**.

A. Election Details

The election will be conducted by mail. The ballots will be mailed to employees employed in the appropriate voting group at 3:00 p.m. on **Friday, November 13, 2020**,

⁴² The parties stipulated to the following commerce facts:

United Rentals (North America), Inc, a Delaware corporation with a facility located at 2520 East Outer Road, Scott City, Missouri, the only facility involved, is engaged in the rental and service of construction equipment. During the past 12 months, a representative period of time, the Employer purchased and received goods valued in excess of \$50,000, which goods were shipped directly to its Scott City, Missouri facility from points located outside the State of Missouri.

from the office of the National Labor Relations Board, Subregion 17 - 8600 Farley Street – Suite 100, Overland Park, Kansas 66212-4677. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **Friday, November 20, 2020**, or otherwise requires a duplicate mail ballot kit, should communicate immediately with the National Labor Relations Board by calling the Subregion 17 Office at (913) 275-6525.

The ballots will be commingled and counted by the Subregion 17 office at 2:00 p.m. CDT on **Friday, December 4, 2020**. In order to be valid and counted, the returned ballots must be received by the Subregion 17 office prior to the counting of the ballots. The parties will be permitted to participate in the ballot count, which will be held by videoconference. A meeting invitation for the videoconference will be sent to the parties' representatives prior to the count. No party may make a video or audio recording or save any image of the ballot count.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **October 24, 2020**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be received by the Regional Director and the parties by **Tuesday, November 10, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or .docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

The list must be filed electronically with the Subregion and served electronically on the other parties named in this decision. The list must be electronically filed with the Subregion by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

Pursuant to Section 102.5(c) of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site (www.nlr.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

DATED at St. Louis, Missouri, this 6th day of November 2020.



William B. Cowen, Acting Regional Director
National Labor Relations Board, Region 14
1222 Spruce Street, Room 8.302
St. Louis, Missouri 63103-2829